

Date: February 27, 2007

To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance

From: Commission on Judicial Performance
Victoria B. Henley, Director-Chief Counsel

Subject: Invitation to Comment on Proposed Amendments to Rules of the Commission on Judicial Performance;
Announcement of Adoption of Code of Ethics for Commission Members

Policy Declaration 3.5 of the Commission on Judicial Performance provides that every two years, in even-numbered years, the commission should review its rules and seek public comment on any proposed enactments, amendments or repeals. As part of the 2006 review of its rules, the commission has approved circulation of proposed amendments to rules 102(k), 126(d), 113, 115, 122(g), 108(c) and 119.5 and proposed new rules 116.5, 134.5 and 125.5 for public comment. The proposed amendments to rules 108(c) and 119.5 and proposed new rule 125.5 were adopted on an interim basis by the commission its January 31, 2007 meeting, pending completion of the comment and review period.

The proposed amendments with a brief explanation of the changes and a form for submission of comments can be found on the commission's Web site at www.cjp.ca.gov under Governing Provisions/Commission Rules. The deadline for comments is April 30, 2007.

Comments may be submitted by mail or facsimile to:

Commission on Judicial Performance
Attn: Janice Brickley, Staff Counsel
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
FAX: (415) 557-1266

At its January 31, 2007 meeting, the commission also adopted a Code of Ethics for Commission Members. The Code of Ethics, Division VI of the commission's Policy Declarations can be found on the commission's Web site under Governing Provisions/Commission Policy Declarations.

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Proposal No. 1

[PROPOSED AMENDMENT TO RULE 102(k) TO AUTHORIZE DISCLOSURE OF INFORMATION TO REGULATORY AGENCIES UPON TERMINATION OF EMPLOYMENT]

Rule 102. Confidentiality and Disclosure

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(k) (Disclosure of information to regulatory agencies upon retirement or resignation) If a judge retires or resigns from office or if a subordinate judicial officer retires, ~~or resigns~~ or is terminated from employment after a complaint is filed with the commission, or if a complaint is filed with the commission after the retirement, ~~or resignation~~ or termination, the commission may, in the interest of justice or to maintain public confidence in the administration of justice, release information concerning the complaint, investigation and proceedings to the State Bar or to other regulatory agencies, provided that the commission has commenced a preliminary investigation or other proceeding and the judge or subordinate judicial officer has had an opportunity to respond to the commission's inquiry or preliminary investigation letter.

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Explanation of Proposed Amendment to Rule 102(k)

Current commission rule 102(k) authorizes the commission to release information regarding a preliminary investigation or other commission proceeding to the State Bar or other regulatory agencies when a judge or subordinate judicial officer retires or resigns from office. The current rule does not expressly cover referral of information when a subordinate judicial officer is terminated from employment by the superior court. The commission proposes that the rule be revised to authorize disclosure of information to a regulatory agency when the subordinate judicial officer has been terminated. The proposed revision would promote uniformity in the rules relating to judges and subordinate judicial officers who leave office while the subject of a commission investigation or proceeding or before a complaint is filed with the commission, to protect the interests of the public and maintain public confidence in the administration of justice.

Proposal No. 2

[PROPOSED REVISION OF RULE 126(d) AUTHORIZING THE COMMISSION TO PETITION A COURT FOR THE APPOINTMENT OF A CONSERVATOR]

Rule 126. Procedural Rights of Judge in Formal Proceedings

* * *

(d) (Appointment of conservator) If the judge is adjudged insane or incompetent, or if it appears to the commission at any time during the proceedings that the judge is not competent to act for himself or herself, the commission ~~shall appoint a conservator~~ may petition a court of competent jurisdiction for the appointment of a conservator unless the judge has a conservator who will represent the judge. ~~In the appointment of such conservator, preference shall be given, whenever possible, to members of the judge's immediate family. If a conservator is or has been appointed for a judge, t~~The conservator may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving, ~~or~~ giving notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the conservator.

Explanation of Proposed Revision of Rule 126(d)

The proposed change would delete language authorizing the commission to appoint a conservator and, instead, authorize the commission to petition a court to do so in accordance with Probate Code section 1820, subdivision (a)(4), which permits interested state agencies to file a petition for the appointment of a conservator for a person. Probate Code section 1801 authorizes a court to appoint a conservator for a person who is unable to manage his or her personal needs or who is "substantially unable to manage his or her own financial resources or resist fraud or undue influence." (Prob. Code § 1801, subds. (a) & (b).)

Proposal No. 3

[PROPOSED ADDITIONS TO RULES 113 AND 115 –NOTICE OF PRIVATE AND PUBLIC ADMONISHMENT MAY CITE PRIOR DISCIPLINE]

Rule 113. Notice of Intended Private Admonishment

If after a preliminary investigation the commission determines that there is good cause for a private admonishment, the commission may issue a notice of intended private admonishment to the judge by certified mail. The notice shall include a statement of facts found by the commission and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 114. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

Rule 115. Notice of Intended Public Admonishment

If the commission determines following a preliminary investigation that there is good cause for public discipline, the commission may issue a notice of intended public admonishment to the judge by certified mail. The notice shall include a statement of facts found by the commission and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 116. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

Explanation of Proposed Additions to Rules 113 and 115

Rule 125(b) permits the admission in formal proceedings of any prior disciplinary action “to prove that the conduct is persistent or habitual or to determine what action should be taken regarding discipline.” Once the private discipline is admitted into evidence at a public formal proceeding it becomes part of a public record and can be cited in the report of the masters and the commission's decision. (Rules 129 & 135.) Prior discipline, including private discipline, historically has been a significant factor in determining the appropriate level of discipline in commission proceedings. (See, e.g., *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339-340; *Inquiry Concerning Judge D. Ronald Hyde*, No. 166, Decision and Ordering Removing Judge Hyde from Office (2003), pp. 27-28; *In re Maciel*, Pub. Admon. (2006).)

Because the rules for private and public admonishment (rules 113 and 115) permit a judge to accept or contest an admonishment without going to formal proceedings (unless the judge so elects), the commission currently cites applicable prior discipline in the notice of intended public or private admonishment. The proposed revisions to rules 113 and 115 codify this practice. If a judge wishes to challenge the inclusion of prior discipline, the judge may do so in written objections to the intended admonishment filed in conjunction with a demand for an appearance before the commission (rules 114(b) and 116(b)), or the judge may elect to demand formal proceedings (rules 114(c) and 116(c)).

Proposal No. 4

[PROPOSED AMENDMENT TO RULE 122(g) TO EXPAND DEPOSITIONS PERMITTED AS DISCOVERY DURING FORMAL PROCEEDINGS]

122. Discovery Procedures

(g) (Depositions) ~~After initiation of formal charges against the judge, the commission or the masters shall order the taking of the deposition of any person upon a showing by the side requesting the deposition that the proposed deponent is a material witness who is unable or cannot be compelled to attend the hearing. If a deposition is ordered, the procedures stated in Government Code section 68753 shall be followed.~~ the filing of the notice of formal proceedings, depositions shall be allowed as provided in this subdivision. The party ~~The side requesting the deposition shall bear all costs of the deposition for service of process, reporter, transcripts and facility usage, and in the case of a videotaped deposition to perpetuate testimony under subpart (1), all direct costs incurred in videotaping the deposition.~~

(1) (Depositions to Perpetuate Testimony) The commission or the special masters shall order the taking of the deposition of any person upon a showing by the side requesting the deposition that the proposed deponent is a material witness who is unable or cannot be compelled to attend the hearing. If a deposition is ordered, the procedures stated in Government Code section 68753 shall be followed. Depositions to perpetuate testimony may be videotaped.

(2) (Discovery Depositions) In addition to depositions to perpetuate testimony provided for under subpart (1) of this subdivision, discovery depositions are permitted as provided in this subpart (2). Discovery depositions may not be videotaped.

a. The judge shall have the right to take depositions of up to four material witnesses, and the examiner shall have the right to take depositions of the judge and up to three other material witnesses. Depositions of commission members or staff are not permitted. Depositions of bench officers, other than the respondent judge, or of court staff are permitted only by written questions, not to exceed 30 questions including subparts, which shall be answered under oath within 20 days of receipt on condition that independent legal counsel is afforded to the deponent as provided by law or by the court. Depositions upon written questions are included in the numerical limits set by this subpart.

b. If the examiner and judge stipulate in writing that a deposition may be taken as a matter of right under subpart (a), the commission shall issue a subpoena for such deposition. If the examiner and judge are unable to agree that a witness is material, or unable to agree concerning the manner, time and place of a deposition, the party seeking the deposition may file a request for deposition subpoena with the commission. Objections shall be filed within five days of filing the request. The commission may place restrictions or conditions on the manner, time and place of any deposition.

c. Each deposition upon oral examination is limited to one day of seven hours. Any objection during a deposition upon oral examination must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the commission, or to

present a motion to the commission that the deposition is being conducted in bad faith or in such manner unreasonably to annoy, embarrass or oppress the deponent or party.

d. Depositions shall be completed 30 days prior to the hearing, unless a cut-off time otherwise is set by the commission or by stipulation of the examiner and the judge.

e. Any motion under this subpart (2) shall be presented to the commission. The commission may designate the chairperson or the chairperson's designee to perform all or any part of its duties under this subdivision. If special masters have been appointed pursuant to rule 121, subdivision (b), the chairperson may designate one or more of them to perform all or any part of the commission's duties under this subpart.

Explanation of Proposed Amendment to Rule 122(g)

The commission's current discovery rule permits depositions only to perpetuate testimony of witnesses who will not be available for the hearing. In 2004, the California Judges Association agreed to withdraw legislation it had sponsored to expand discovery depositions in order to allow the commission to provide for such depositions by rule. After reviewing a number of suggestions and comments from CJA, the commission determined to release this proposed amendment to obtain further comment from CJA as well as other interested persons and organizations.

In formulating a workable rule for depositions, the commission determined to provide for a specified number of depositions for each side as a matter of right. The commission and the special masters appointed to preside over hearings in commission formal proceedings are not in session on a full-time basis and, thus, they are not able to adjudicate multiple requests and issues related to depositions. Also, expanding discovery must not result in undue delay in commission proceedings. Accordingly, the proposal would permit each side four depositions of one day each. The respondent judge would be permitted four depositions of material witnesses; the examiner would be permitted to take the deposition of the respondent judge and three other material witnesses.

To avoid disruption within the courts, the proposal would permit depositions of bench officers, other than the respondent judge, and of court staff only by written interrogatory with the assistance of legal counsel. To avoid delay in the proceedings, responses to such interrogatories would be due 30 days after receipt.

Proposal No. 5

[PROPOSED NEW RULE 116.5 – NEGOTIATED SETTLEMENT DURING PRELIMINARY INVESTIGATION]

Rule 116.5. Negotiated Settlement During Preliminary Investigation

At any time during a preliminary investigation or an admonishment proceeding under rules 113-116, the commission may designate trial counsel or another attorney authorized by the commission to negotiate with the judge a resolution of any matter at issue. A proposed resolution shall be jointly submitted to the commission, which may accept it, reject it or return it to the judge and examiner to consider modifications to it. No agreement between the judge and legal staff is binding unless approved by the commission. A settlement proposal rejected by the commission cannot be used against the judge in any proceedings. After formal proceedings are instituted, settlement negotiations are governed by rule 127.

Explanation of Proposed New Rule 116.5

Current commission rule 127 authorizes trial counsel and the judge to enter into negotiations on a stipulated discipline *after the initiation of formal charges* and before final disposition. The commission proposes to expressly permit commission legal staff to enter into negotiations with the judge at the preliminary investigation stage of the proceedings. In appropriate cases, the proposed rule could hasten resolution of a matter. The rule maintains the requirement that any negotiated settlement be approved by the commission. It also retains the provision that the settlement could not be used against the judge in later proceedings if the proposal is rejected by the commission.

Proposal No. 6

[PROPOSED AMENDMENT TO RULE 108(c) – EXTENSION OF TIME FOR COMMENCING HEARING BEFORE SPECIAL MASTERS]

Rule 108. Extensions of Time

* * *

(c) (Extension of time for commencing hearing before the special masters ~~to obtain reasonable discovery or for other reasons~~) In order to maintain public confidence in the integrity of the judiciary and protect the welfare of the public, all hearings before the special masters shall be heard at the earliest possible time after the issuance under rule 118 of the notice of formal proceedings. In accordance with this policy, extensions of time for commencing a hearing before the special masters are disfavored. The chairperson of the commission or the presiding master may extend the time for commencing a hearing before the special masters upon a showing of good cause ~~to permit either party to obtain reasonable discovery as provided in these rules, or for other reasons set forth in a showing of good cause, supported by declaration detailing specific facts showing that a continuance is necessary.~~ Good cause does not include the ordinary press of business.

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Explanation of Proposed Amendment to Rule 108(c)

The amendment to rule 108(c) was adopted as an interim rule by the commission at its January 2007 meeting. The rule is intended to protect the public's interest in prompt resolution of commission matters that have been set for formal proceedings. Continuance of a matter that has already been scheduled for a hearing before the special masters often causes inconvenience and hardship to witnesses, the special masters, parties, and court personnel at the venue chosen for the hearing. Selecting new dates requires finding an available venue and also accommodating the schedules of the special masters, the judge and counsel. This may necessitate the appointment of new special masters or result in undue delay. Policy Declaration 3.12, "Extensions of Time," states that extensions of time in commission proceedings are disfavored. The amendment to rule 108 would provide explicit notice of the application of this commission policy to extensions of time in formal proceedings.

The amendment would also provide notice of the specific requirements for an extension of time of a hearing before special masters. An extension would only be granted upon a request supported by declaration detailing specific facts showing that a continuance is necessary. This provision is consistent with the requirements for continuances of civil and criminal trials. (Pen. Code § 1050(b); Cal. Rules of Court, rule 3.1332(b).)

Proposal No. 7

**[PROPOSED NEW RULE 134.5 –RULE OF NECESSITY - OTHERWISE
DISQUALIFIED MEMBER TO PARTICIPATE WHEN NECESSARY TO CONVENE
QUORUM]**

Rule 134.5. Rule of Necessity

A commission member shall not be subject to disqualification based on an actual or potential conflict of interest if his or her disqualification would prevent the existence of a quorum. This rule does not apply if a quorum can be convened with members who are not actually present. The basis of the commission member's actual or potential conflict and the reason the member's participation was necessary shall be recorded in the minutes and included in any resulting discipline.

Explanation of Proposed New Rule 134.5

The proposed rule is a statement of the well-established “rule of necessity.” Developed under common law, the “rule of necessity” allows public officials to take actions they would otherwise be disqualified from taking by operation of conflict of interest rules if their disqualification would make it impossible for the public agency to fulfill one of its vital public duties. The rule was developed “to prevent the vital processes of government from being halted or impeded by officials who have conflicts of interests in the matters before them.” (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 520; *Olsen v. Cory* (1980) 27 Cal.3d 532; *Aluisi v. Fresno County* (1960) 178 Cal.App.2d 443.)

The proposed rule provides that a commission member with an actual or potential conflict is not disqualified from participating in the proceedings when the commission would not otherwise have a quorum. The basis of the commission member's conflict and the reason the member's participation was necessary would be recorded in the minutes and included in any resulting discipline. Although the practice is authorized by case law, the proposed rule is designed to inform the public and the judiciary that it could be followed in commission proceedings.

Proposal No. 8

[PROPOSED REVISIONS TO PROCEDURES FOR FILING OF DOCUMENTS AFTER INSTITUTION OF FORMAL PROCEEDINGS– AMENDMENT TO RULE 119.5 AND NEW RULE 125.5]

Rule 119.5. Filing With the Commission

After institution of formal proceedings, all briefs and other documents-papers required to be filed with the commission shall be delivered to commission staff at the commission office during regular business hours and shall be accompanied by a proof of service of the document upon the other party or parties, and upon the special masters if they have been appointed in the matter. This includes documents submitted in conjunction with a hearing before the special masters, other than exhibits to be admitted at the hearing. Exhibits admitted at a hearing before the masters shall be transmitted to the commission office pursuant to rule 125.5. A document is filed with the commission when the original is stamped or otherwise marked “filed” with the date. The commission’s agent for purposes of filing documents after institution of formal proceedings is the Legal Advisor to Commissioners or the Legal Advisor’s designee. A filing may be evidenced by a conformed copy of the cover page of each document submitted for filing.

~~Unless otherwise specified, documents submitted in conjunction with a hearing before special masters shall be delivered to the presiding master accompanied by a proof of service on the other masters and the other party or parties, or as otherwise requested by the masters; a copy shall be lodged with the Legal Advisor pending return of the record at the conclusion of the hearing.~~

Rule 125.5 Exhibits at Hearing

Original exhibits admitted at a hearing before the special masters shall be transmitted by the masters to the commission office at the completion of the evidentiary portion of the hearing, unless the masters determine that there is reason to retain the original exhibit or exhibits to assist in the preparation of their report to the commission. Any original exhibits retained by the masters shall be transmitted to the commission at or before the time the report of the masters is submitted to the commission.

Explanation of Proposed Amendment to Rule 119.5 and Proposed New Rule 125.5

The commission has adopted on an interim basis the proposed amendment to rule 119.5 and new rule 125.5. Under the current version of rule 119.5, originals of documents related to a hearing before the special masters are filed with the presiding master. The proposed change would provide for the filing of all briefs and other papers at the commission office, with copies served on the masters and the other party or parties. The only exception to this rule would be for original exhibits admitted at the hearing; original exhibits would be filed with the masters who would be required to transmit the original to the commission at the completion of the hearing.

Under current rule 119.5, the presiding master has the responsibility of filing and maintaining documents submitted in conjunction with the hearing. Presently, the commission does not receive the evidentiary record until the masters submit their report, which renders public review difficult. The proposals are designed to assure that the originals of briefs and other papers, other than hearing exhibits, submitted in conjunction with formal proceedings are filed and maintained in the commission office to prevent loss or damage, and to assure that public documents are available for inspection at the commission office.